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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants below, are: United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Everett Ehrlich, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Harry Scarr, As Acting Director of Bureau of Census; William J. Clinton, As President of the United States; Dan Glickman, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health and Human Services; Henry Cisneros, As Secretary of Housing and Urban Development; Robert B. Reich, As Secretary of Labor; Federico Peña, As Secretary of Transportation; Richard W. Riley, As Secretary of Education.

Respondents, plaintiffs below, are: City of New York; State of New York; City of Los Angeles; City of Chicago; City of Houston; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; Jerry Alan Wood; Carolyn Sue Lopez; City of Atlanta, Georgia; Maynard Jackson, Individually, and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City

of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernadino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona; Council of Great City Schools. By virtue of Rule 12.4 of this Court, the State of Wisconsin and the State of Oklahoma, intervenor-defendants below, and Donnald K. Anderson, As Clerk of the United States House of Representatives, a defendant below, are also respondents in this Court.

The following were parties to the proceedings in the district court, but were not parties to the proceeding in the court of appeals: People of the State of California *ex rel.* Daniel E. Lungren, Attorney General; and County of Hudson, New Jersey.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States Department of Commerce, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40)[2] is reported at 34 F.3d 1114. The opinions of the district court (Pet. App. 41-95, 96-120, 121-134) are reported at 822 F. Supp. 906, 739 F. Supp. 761, and 713 F. Supp.

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[1] Petitions for a writ of certiorari filed by the State of Wisconsin and the State of Oklahoma have been docketed in this Court as Nos. 94-1614 and 94-1631, respectively.

[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 94-1614.

48. The decision of the Secretary of Commerce (Pet. App. 135-415) is published at 56 Fed. Reg. 33,582.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. The petition for rehearing filed by the State of Oklahoma was denied on December 12, 1994. Pet. App. 419-421. The petition for rehearing filed by the State of Wisconsin was denied on January 4, 1995. Pet. App. 416-418. On March 27, 1995, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 4, 1995. On April 25, 1995, Justice Ginsburg further extended the time within which to file to and including June 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clause 3, of the United States Constitution; the Fifth Amendment and Section 2 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b) are reproduced in relevant part at Pet. App. 422-425.

STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 (the Apportionment Clause) provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers," and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States

according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Congress has assigned to the Secretary of Commerce the responsibility for conducting the decennial census and has vested the President with the responsibility for establishing and reporting the apportionment of Representatives following completion of the census. The Census Act provides that the decennial census shall be conducted by the Secretary of Commerce "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Congress has, however, prescribed a strict timetable for the census. The population of the United States is to be determined as of April 1 of the census year. The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within a week of the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing "the whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed formula for apportioning Representatives. 2 U.S.C. 2a(a). Within 15 days of the receipt of that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). Following the 1990 decennial census, the President transmitted the statement of the apportionment of Representatives required by 2 U.S.C. 2a(a) to Congress on January 3, 1991. 27 Weekly Comp. Pres. Doc. 6 (1991).

2. a. The 1990 decennial census was conducted in accordance with an elaborate, multi-staged procedure designed to locate and identify each housing unit in the country and to enumerate each person in those units by

means of a system replete with rechecks and cross-checks.[3] Although those processes resulted in an extraordinary rate of success, many persons were not counted. The Secretary of Commerce originally estimated that the census enumeration failed to count approximately 2.1% of the population. Pet. App. 158. It was subsequently determined, however, that that estimate significantly overstated the undercount, and the Census Bureau represented at the trial in this case that the undercount was 1.6% of the population. *Id.* at 58 n.12.[4]

It is undisputed that the undercount varies among population subgroups. Pet. App. 138-139, 158. Members of racial minorities are undercounted at a greater rate than nonminority residents. *Ibid.*[5] A differential undercount also exists, however, among various other subgroups. For example, men are missed at a higher rate than women, the young are missed at a higher rate than the elderly, and renters are missed at a higher rate than homeowners. DX 1, at 457-458.

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[3] This process included the development of comprehensive maps of each block in the United States, the identification of housing units on each block, test censuses and post-enumeration survey tests, the actual enumeration (including multiple contacts with each household that did not return a census questionnaire), and pre- and post-census review by state and local governments. See generally Pet. App. 319-332; *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1376 (6th Cir. 1993) ("the Census Bureau's efforts to conduct as accurate a census count as possible are extraordinary"), cert. denied, 114 S. Ct. 1217 (1994).

[4] In January 1993, Barbara Bryant, then the Director of the Census Bureau, estimated that the undercount might be in the range of 0.9% to 1.2%. 58 Fed. Reg. 75 (1993). The Commerce Department now believes, however, that 1.6% is the correct estimate of the undercount. That 1.6% undercount is approximately the same as the undercount in the 1980 census. Pet. App. 58 n.12.

[5] The decision of the Secretary of Commerce estimated that "Blacks appear to have been undercounted in the 1990 census by 4.8%, Hispanics by 5.2%, Asian-Pacific Islanders by 3.1%, and American Indians by 5.0%." Pet. App. 138-139.

b. The problem of the overall undercount and differential undercounts among demographic groups led the Secretary of Commerce to consider a statistical adjustment to the 1980 decennial census. Ultimately, however, no adjustment was undertaken. That decision not to adjust was challenged in a number of lawsuits. None was successful. The action brought by the State of New York resulted in a trial, and the suit was not resolved until 1987. *Cuomo* v. *Baldrige*, 674 F. Supp. 1089, 1104 (S.D.N.Y. 1987).

In the same year that litigation regarding the 1980 census finally concluded, the Department of Commerce announced that no statistical adjustment would be made for the 1990 census. In the following year, plaintiffs filed this suit, seeking to compel an adjustment to the 1990 census for all purposes for which the census is used, including the apportionment of Representatives among the States and the distribution of federal funds. The defendants included the President, the Secretary of Commerce, the Census Bureau and its Director, and the Clerk of the House of Representatives.[6]

In July 1989, the parties entered into a stipulation under which the defendants agreed to reconsider the adjustment question and to reach a decision by July 15, 1991. Defendants also agreed to conduct a post-enumeration survey (PES) of at least 150,000 households in order to generate data on which a statistical adjustment could be based.[7] In accordance with the stip-

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[6] On February 8, 1989, counsel for the Clerk of the House of Representatives entered into a stipulation providing that the Clerk "neither objects nor consents to the relief requested by the plaintiffs in their complaint and takes no position with respect to the questions involved in this litigation." Stipulation Regarding Participation of Defendant Donnald K. Anderson at 1-2. The Clerk agreed to be bound by any judgment entered in the case and accordingly was "relieved of any obligation to answer the complaint or otherwise participate in this litigation." *Id.* at 2.

[7] The PES, which was conducted in July 1990, involved an attempt to identify all individuals living in a sample of more than

ulation, the Secretary of Commerce also adopted eight guidelines that he would consider in deciding whether to order an adjustment of the 1990 census totals. Plaintiffs challenged those guidelines, but the district court sustained them. Pet. App. 96-120.

c. On July 15, 1991, the Secretary of Commerce issued his determination that the census headcount would not be statistically adjusted. Pet. App. 135-415. At the outset, the Secretary explained that the crucial question is not whether an adjustment would improve accuracy in terms of absolute numbers at the national level, but whether adjusted numbers would provide an improved account of the way the population is distributed among the States and their subdivisions. See *id.* at 141, 146-147, 161, 184. He noted that this focus on "distributive" rather than "numeric" accuracy follows from the constitutional purpose of the census, which is to apportion Representatives among the States, and the other uses of the census, including intrastate electoral redistricting and the distribution of federal funds. See *id.* at 141, 184, 200-201. The Secretary also stated that, in accordance with the guidelines, the unadjusted figures would be regarded as the most accurate unless the adjusted numbers were shown to be more accurate. *Id.* at 184.[8]

168,000 housing units across the United States in order to determine whether those persons had been properly counted and located in the census. The Census Bureau placed persons in the PES in one of 1392 categories, called "post-strata," defined by five variables: age, sex, race, location, and home tenure (owner vs. renter); the Census Bureau then calculated the rate at which each post-stratum was accurately counted in the census. Data obtained from the PES were then used to evaluate the accuracy of the original census and, through the use of a complex methodology involving numerous statistical assumptions and models, to generate adjusted population estimates. See Pet. App. 332-346.

[8] Guideline One stated that "[t]he Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is

The Secretary acknowledged that a statistical adjustment would be likely to increase the numeric accuracy of the census. Pet. App. 184-185, 200. He concluded, however, that the adjusted figures had not been shown to increase distributive accuracy, and that in fact "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." *Id.* at 185. In support of his determination, the Secretary analyzed a variety of statistical disputes regarding the accuracy of the proposed adjustment. His decision explained, in considerable detail, that the adjustment process consisted of a series of statistical assumptions, each of which was susceptible to error.[9] The Secretary noted as well that the difficulty of his decision was increased by the "diversity of opinion among [his] advisors." *Id.* at 140. The Secretary noted that "[t]he Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate. There was also disagreement among the professionals in the Commerce Department, which includes the Economics and Statistics Administration and the Census Bureau." Pet. App. 140.

The Secretary also analyzed at length the efforts made to estimate the relative accuracy of the adjusted and unadjusted numbers. Pet. App. 185-200. That inquiry focused largely on the Census Bureau's "loss function

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shown to be more accurate." Pet. App. 151. The Secretary explained in his July 15, 1991, decision that "[t]he true population counts cannot be observed. However, classical statistics provides a standard way of approaching the required inference. In accordance with Guideline One, we take as a working (null) hypothesis that the actual enumerations in fact better characterize the true population. The adjusted counts are an alternative measure and the question is whether the available evidence permits us to reject the hypothesis that the census better describes the true population." *Id.* at 184.

[9] For a concise description of the adjustment process, see D. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991).

model," which was developed to measure the "loss" from using the census as compared to the "loss" from using an adjusted count.[10] The Secretary concluded that the loss function analysis involved so many uncertainties that its utility was questionable." *Id.* at 188-192.

In the Secretary's view, however, the analysis tended to show that the adjusted figures were less accurate than the unadjusted count at every level from the state level down. In this regard, the Secretary noted that the Bureau's initial loss function analysis had significantly overstated the distributive accuracy of the adjusted figures at the state and local levels, where the census is actually used for apportionment and funding. See Pet. App. 141. The Secretary pointed out that the original loss function analysis appeared seriously to underestimate the variances, or estimates of sampling error, in the adjusted data. *Id.* at 190-191. The Census Bureau's Undercount Steering Committee had reported that the relevant variances were understated by a factor in the range from 1.7 to 3. *Ibid.*[11] The Secretary concluded that even if the variances were increased only by a factor of 2, a figure at the low end of the Bureau's range, "the proportional shares of about 28 or 29 states would be worsened by an adjustment in terms of distributive accuracy." *Id.* at

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[10] The loss is the difference between each count and the "true population." Pet. App. 188-189. The "true population" is, of course, unknown. *Ibid.* Indeed, the purpose of an adjustment is to arrive at an estimate of the "true population." To deal with that problem, the Bureau attempted to create a hypothetical "true population" by taking the proposed adjusted figures and attempting to correct them for various "biases" or errors. See *id.* at 186-187. The census and the adjusted counts were then compared to the estimated "true population."

[11] The Undercount Steering Committee expressed that conclusion in an Addendum issued on June 27, 1991—less than three weeks before the Secretary was required, under the stipulation, to announce his decision for or against adjustment. See Pet. App. 190.

191; see *id.* at 74.[12] The record further showed that, even before the variance correction, an adjustment was estimated to worsen the distributive accuracy of 11 of the 23 metropolitan areas in cities with 500,000 or more inhabitants, including the City of New York. *Id.* at 191.[13] The Secretary expressed concern about the still-fluid nature of the Department's analysis of the raw data and about the possibility that additional analysis following a decision to make a statistical adjustment would further erode the basis for such an adjustment. See *id.* at 144.

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[12] Census Bureau research following the Secretary's decision, as presented at trial, confirmed the Secretary's conclusion that the variances were underestimated. Tr. 1914-1915. Based on that research, the Bureau's Chief Mathematician testified at trial that, contrary to his original recommendation to the Secretary, he no longer favored the adjustment proposed for the Secretary's consideration in 1991. Tr. 1920-1921.

[13] Moreover, although the adjustment was in large part proposed to remedy the disproportionate undercount of minorities, the administrative decision explained that the driving force for an adjustment may not have been the undercount at all. The decision noted that "[o]ne would hope that the predominant determinant of the adjustment would be the number of people missed in the census," so that "areas with high miss rates get high adjustments." Pet. App. 173. The decision revealed, however, that the areas with the three highest omission rates in fact had very different adjustment rates. To a large extent, it turned out, the proposed adjustment was driven by attempts to correct for overcounting in certain areas and certain respects. *Ibid.* The administrative decision suggested the lack of a firm basis for finding a direct correlation between a State's percentage of minority residents and how it fares under an adjustment. Thus, the undercount rate for Montana was higher than that of New York. See *id.* at 194. Indeed, despite its relatively large proportion of minorities, New York's share of the population would actually have decreased as a result of the proposed adjustment. See Administrative Record (A.R.), App. 10, Table 5.

The Secretary also emphasized that even very small changes in the assumptions utilized in developing the adjustment methodology would shift seats in the House of Representatives. For example, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also *id.* at 218. The decision noted as well the gravity of departing from the 200-year practice of relying upon unadjusted figures to apportion Representatives among the States. The Secretary stated that "[d]ecisions that may be nearly equally defensible from a technical standpoint may have very different outcomes which can be known in advance of the decisions," thereby creating the danger of actual or perceived "manipulation of the census for partisan gain." *Id.* at 236-237.

3. Following the Secretary's decision, the district court permitted extensive discovery and then set the case for trial. The trial lasted 13 days, involving numerous witnesses and thousands of pages of exhibits. At the conclusion of the trial, the district court granted judgment for the governmental defendants, using the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). See Pet. App. 65-66.[14] The court examined the Secretary's consideration of each of the guidelines adopted pursuant to the stipulation and

[14] At a prior stage of the litigation, the district court had concluded that "Article I, § 2 requires that the census be as accurate as practicable." Pet. App. 109 (brackets and internal quotation marks omitted). The court adhered to that conclusion in its final ruling. See *id.* at 68. The court made clear, however, that its application of that standard would reflect deference to the Secretary's resolution of disputed technical and policy questions. See *ibid.* (test is "whether the Secretary's decision was arbitrary and capricious in light of the requirement that the decision provide the most accurate census practicable").

concluded that his consideration of each was reasonable. In particular, the court found that "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." *Id.* at 77-78. The district court also explored several of the underlying statistical controversies. Although the court stated in passing that it probably would have ordered an adjustment if it had been called upon to decide the issue de novo (*id.* at 89), it found no basis to set aside the Secretary's determination.

4. On appeal to the Second Circuit, plaintiffs did not contest the district court's determination that the Secretary's decision against adjustment was not arbitrary or capricious. They argued instead that the district court should have analyzed the adjustment issue de novo because the outcome of the decision affected the allocation of seats in the House of Representatives and thus raised constitutional concerns. The court of appeals rejected the argument for de novo review. Pet. App. 23, 34. The court stated, however, that "both the nature of the right and the nature of the affected classes are factors that traditionally require that the government's action be given heightened scrutiny: the right to have one's vote counted equally is fundamental and constitutionally protected, and the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." *Id.* at 33. The court noted that in "one person-one vote" challenges to intrastate congressional districting plans, a court must first determine "whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* at 36-37 (quoting *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983)). In that setting, if a court determines that a good-faith effort has not been made, "the State must bear the burden of

proving that each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 37 (quoting *Karcher*, 462 U.S. at 731).

Applying the same analysis here, the court of appeals concluded that "plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." Pet. App. 38. The court reached that conclusion by focusing on "the Secretary's acknowledgement" that use of the adjusted population estimates likely would increase the overall *numeric* accuracy of the census at the national level and would reduce the disproportionate undercount of minorities. *Ibid.* The court further stated that the Secretary "gave other factors priority over achievement of greater accuracy" at the national level by, *inter alia*, "valu[ing] 'distributive accuracy' over numerical accuracy." *Ibid.* It also expressed the view that the Secretary's declaration that an adjustment should not be made unless it would result in *greater* distributive accuracy implied that the Secretary did not make the requisite good-faith effort in light of the improved count of the total national population and the improved absolute count of minorities. *Ibid.*; see also *id.* at 38-39.[15]

The court of appeals concluded that

> plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable, and that the burden thus shifted to the Secretary to justify his decision

[15] The court of appeals also noted the Secretary's concern that an adjustment that did not clearly provide a more accurate account of the distribution of the population would introduce fears of political manipulation. The court stated that that concern reflected a belief that "eliminating the possibility of manipulation of statistical surveys in the future was more important than using the admittedly unmanipulated 1990 PES to achieve a more accurate overall count." Pet. App. 38.

> not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities. The Secretary's decision not to make that adjustment is subject to scrutiny not under an arbitrary-and-capricious standard of review but rather under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity. While precise equality is a goal that at the national level may be illusory, there must be a good-faith effort to approach that goal as nearly as is practicable, and the substantive question becomes what choice should be made among imperfect alternatives. When the official answer is that it is preferable to undercount minorities, that answer must be supported by an official showing that that result (a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective.

Pet. App. 39-40. The court of appeals accordingly vacated the judgment of the district court and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 40.

Judge Timbers dissented. He expressed agreement with the decision and reasoning of the district court and noted that the majority's holding was in conflict with the decisions of two other courts of appeals. Pet. App. 40 (citing *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994); *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).[16]

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[16] The States of Wisconsin and Oklahoma filed petitions for rehearing with suggestions of rehearing en banc. The court of appeals denied both petitions. Pet. App. 416-421.

REASONS FOR GRANTING THE PETITION

In considering whether the 1990 census figures should be statistically adjusted, the Secretary of Commerce received sharply conflicting recommendations from independent advisors and from subordinates within his own Department. The question for this Court is not whether, on balance, the Secretary made the appropriate determination as a matter of statistics or policy, but whether his decision not to make an adjustment was within the range of constitutionally permissible options. As we demonstrate below, it was.

Resolution of the technical and policy disputes bearing on the adjustment determination is substantially entrusted to the Secretary's expert judgment and discretion, and judicial review must reflect appropriate deference to his decision. Such deference is mandated by generally applicable principles of administrative law. It is required as well by the broad delegation of authority expressed in the Constitution itself, which states that the census shall be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3, and in the Census Act, which authorizes the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. 141(a). And it is required by the compelling interest in the finality of the President's apportionment of Representatives among the States in January 1991, which was based on the unadjusted census data.

Secretary Mosbacher's July 15, 1991, decision against adjustment of the 1990 census figures was reasonable and consistent with applicable constitutional standards. We agree with the court of appeals that the Constitution and the Census Act do not bar a statistical adjustment of census data. See Pet. App. 23-26; 13 U.S.C. 141 (decennial census), 181 (intercensal population data). And our disagreement with the court of appeals, we emphasize, does not concern the need for census procedures

that are free from racial discrimination. Credible evidence that either the enumeration of the population or the decision against adjustment was tainted by a discriminatory motive would raise grave constitutional concerns. There was, however, no such showing here. Moreover, the court of appeals' analysis reflects a fundamental misunderstanding both of the bases for the Secretary's decision and of the governing constitutional principles. For that reason—and because two other courts of appeals, in contrast to the court below, have rejected constitutional challenges to Secretary Mosbacher's decision not to adjust the 1990 census figures—review by this Court is warranted.

1. The Secretary's decision not to undertake an adjustment of the 1990 census figures rested primarily on three determinations. First, the Secretary concluded that distributive rather than total numeric accuracy should be of paramount importance in deciding whether to make an adjustment. Second, the Secretary determined that the unadjusted census figures would "be considered the most accurate count of the population of the United States, at the national, State, and local level, unless an adjusted count is shown to be more accurate." Pet. App. 151. Finally, the Secretary concluded that the adjusted figures had not been shown to improve distributive accuracy and that adjustment was therefore not warranted.[17]

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[17] Pursuant to the stipulation and guidelines, see pages 5-6, *supra*, the Secretary's 1991 decision also discussed in detail several other factors bearing on the decision not to adjust. We believe that the Secretary's consideration of those factors was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2778 (1992). However, disputes concerning the propriety of those aspects of the Secretary's decision are not central to this case for present purposes. Although the Secretary believed that such factors as encouraging participation in future censuses and the fear of actual or perceived political manipulation lent further support to the decision against adjustment, he stated unequivocally that the adjusted figures had not been shown to improve the accuracy of the census in the relevant

The first two determinations are policy decisions that a court may review "to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992).[18] The third is an exercise of technical judgment that is properly reviewable, if at all, only under a deferential "arbitrary and capricious" standard. Each of the three determinations easily withstands judicial scrutiny.

a. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78. The constitutional purpose of the census is to determine the apportionment of Representatives among the States, U.S. Const. Art. I, § 2, Cl. 3, which is to be based on their "respective numbers, counting the whole number of persons in each State." Amend. XIV, § 2. Even a dramatic undercounting of the population would not threaten the goal of fair apportionment so long as each State's share of the total population was accurately determined. Conversely, a precise estimation of the nation's total population is of no value in the apportionment

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(*i.e.*, distributive) sense. Moreover, such factors as concerns about future participation and actual or perceived political manipulation are not irrelevant to the overall, long-term accuracy of the census. Cf. *Baldrige* v. *Shapiro*, 455 U.S. 345, 353-354 & n.8, 361 & n.17 (1982).

[18] Respondents have not contended that the text of the Constitution compels the Secretary to employ adjusted figures or reflects a preference for that result. Their contention instead has been that use of a statistical adjustment is necessary to further the constitutional goal of equal representation.

process if the States' respective shares of that population are inaccurately estimated. Thus, the Secretary's focus on distributive rather than numeric accuracy was "consistent with the constitutional language and the constitutional goal of equal representation." *Franklin*, 112 S. Ct. at 2777. Indeed, in the court of appeals, plaintiffs specifically stated that they "agree (as do, for that matter, all experts on either side of the adjustment question) that it is distributive accuracy that is of paramount importance for the constitutional and legal purposes for which the census is conducted." Pltfs' C.A. Reply Br. 14 n.4.

b. Similarly, the Secretary's determination that unadjusted figures would be considered the most accurate absent a contrary showing was a judgment "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 112 S. Ct. at 2778. In light of the 200-year practice of relying on unadjusted figures, it was surely permissible to conclude that those figures should be treated as the most accurate unless alternative numbers were shown to be better. Cf. *id.* at 2777-2778 (noting importance of historical practice); *id.* at 2785 (Stevens, J., concurring in part and concurring in the judgment) ("The 'usual residence' policy that has guided the census since 1790 provides a further standard by which to evaluate the Secretary's exercise of discretion."). Nor could "the constitutional goal of equal representation," *id.* at 2777, plausibly be thought to require the Secretary to use adjusted figures that he has not found to be more accurate than the unadjusted numbers. In any event, the Secretary did not simply determine that proponents of adjustment had failed to prove the greater distributive accuracy of adjusted figures. Rather, he affirmatively concluded that "the evidence provided by the Census

Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185.[19]

c. The district court held that the Secretary "was neither arbitrary nor capricious" in concluding that the superior distributive accuracy of the adjusted figures had not been demonstrated. Pet. App. 77. That holding was correct. As Census Director Bryant observed in her recommendation to the Secretary in favor of an adjustment, "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." *Id.* at 59. The Secretary engaged in exhaustive analysis of the pertinent evidence, however, and his resolution of disputed technical questions is reviewable only under an extremely deferential standard. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 377-378 (1989) (where "analysis of the relevant documents requires a high level of technical ex-

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[19] The court of appeals suggested in-passing that the Secretary regarded the adjusted and unadjusted numbers as equally accurate (see Pet. App. 38) and asserted that the adjusted figures would improve accuracy for the areas in which up to two-thirds of the population resided (see *id.* at 39). Those characterizations of the record reflect a basic misreading of the Secretary's decision and the evidence at trial. The two-thirds figure was an original estimate provided by the Census Bureau using its "loss function model." The Secretary's decision explained in considerable detail that the loss function model had failed to take into account variances that the Undercount Steering Committee subsequently reported to be significantly understated. See *id.* at 185-192. As the district court explained, "when the Secretary employed a statistical variance toward the low end of the acceptable range envisioned by the [Undercount Steering Committee], he found that the proportional shares of 28 or 29 states would be worsened by adjustment." *Id.* at 74. As noted above, subsequent research by the Census Bureau and further evidence presented at trial demonstrated that the original loss function analysis substantially overstated the accuracy of the adjusted data. See pages 7-9 & note 12, *supra*. The court of appeals' reliance on data that the Secretary had specifically corrected underscores the error of its analysis.

pertise, [courts] must defer to the informed discretion of the responsible federal agencies") (internal quotation marks omitted); see also *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994); *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).[20] The Secretary's deci-

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[20] Two courts of appeals have concluded, in rejecting constitutional challenges to the Secretary's decision against adjustment, that the Apportionment Clause "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology" because such a lawsuit "invokes no judicially administrable standards." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992); accord *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1375-1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). On the other hand, it might plausibly be argued that, in light of "the constitutional goal of equal representation," *Franklin*, 112 S. Ct. at 2777, the Secretary's use of an irrational statistical methodology that affects the apportionment of Representatives among the States is subject to judicial scrutiny. Cf. *id.* at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment).

There is no basis, however, for respondents' contention in the court of appeals that the central statistical issue in this case—whether use of the adjusted figures would have improved the distributive accuracy of the census—should have been resolved by the district court de novo on the ground that the case involves a constitutional claim. Although issues pertaining to the accuracy of the census implicate constitutional values, resolution of the statistical dispute in this case does not involve the interpretation of a constitutional text. Rather, it involves an exercise of technical expertise to which judicial deference is required. Such deference is especially appropriate as a constitutional matter in light of the broad discretion vested in Congress by the Apportionment Clause's provision that the census be conducted "in such Manner as [Congress] shall by Law direct," Art. I, § 2, Cl. 3; see *Baldrige*, 455 U.S. at 361, and by the broad delegation of authority by Congress contained in the Census Act, see 13 U.S.C. 141(a) (Secretary shall conduct the decennial census "in such form and content as he may determine"). Finally, de novo resolution by the district courts of the question whether an adjustment would increase distributive accuracy would create the possibility of inconsistent findings by

sion, based on that analysis, was within the range of constitutionally permissible choices. That is especially so in light of (1) the need for the Secretary to make a decision by the July 15, 1991, deadline (to which respondents stipulated in the district court and which they did not challenge below), and (2) the Secretary's determination that the state of the administrative record and the various expert evaluations of it were not at that time sufficiently settled to permit him to make a decision in favor of adjustment with the degree of confidence he believed was appropriate for such a significant departure from past practice. See Pet. App. 140-141, 144.

2. The court of appeals regarded the Secretary's 1991 decision against adjustment of the 1990 decennial census as analogous to a State's decision to create congressional districts of unequal size. Under this Court's precedents, a demonstration that disparities in the size of congressional districts within a State are "not the product of a good-faith effort to achieve population equality means * * * that the burden shift[s] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). In the present case, the court of appeals concluded that "plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that "the burden thus shifted to the Secretary to justify his decision not to adjust the census in a way that the [district] court found would for most purposes be more accurate and would lessen the disproportionate counting of minorities." Pet. App. 39.

The court of appeals thus treated the Secretary's decision as suspect on the basis of (a) the Secretary's acknowledgment that an adjustment would probably im-

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courts in different jurisdictions—each reviewable on appeal only under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985).

prove total numeric accuracy at the national level, (b) a purported district court finding that the adjusted figures "would for most purposes be more accurate," Pet. App. 39, and (c) the uncontested fact that the undercount of racial minorities was greater than the undercount of nonminority residents. The court of appeals' analysis does not withstand scrutiny.

a. Any effort to ensure that congressional districts in different States are precisely equal in population "is constrained by three requirements. The number of Representatives shall not exceed one for every 30,000 persons; each State shall have at least one Representative; and district boundaries may not cross state lines." *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 447-448 (1992). Within those constraints, responsibility for implementation of the constitutional goal of equal representation lies both with Congress (which must apportion Representatives among the States "according to their respective Numbers," Art. I, § 2, Cl. 3; Amend. XIV, § 2) and with the States themselves (which are required, in conducting intrastate districting, to create districts of essentially equal size).

The judicial roles in the two contexts are, however, quite distinct. This Court has held that Congress's "apparently good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S. at 464. The Secretary's statistical and policy judgments in the conduct of the census are entitled to at least as much deference as Congress's selection of a method for apportioning Representatives on the basis of census data. That is so because Congress, in the exercise of its broad "discretion" regarding the census, *Baldrige*, 455 U.S. at 361, has directed the Secretary to conduct the decennial census "in

such form and content as he may determine," 13 U.S.C. 141(a), and because the constitutional text and purposes furnish even less guidance with respect to the manner and details of enumerating the population in the first place than they do with respect to the apportionment of Representatives among the States on the basis of that enumeration.

The court of appeals failed to accord the requisite deference to the Secretary's judgment. Indeed, it entirely failed to explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total *numeric* accuracy of the census figures at the national level. Numeric accuracy does not answer the critical question for adjustment purposes, namely, whether the States' respective shares of the total population would be more accurately determined. Distributive accuracy does. As the district court recognized, "[t]he Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits." Pet. App. 77-78.

The court of appeals nonetheless concluded that "the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable," and that the Secretary's failure to maximize numeric accuracy gave rise to a burden of explanation akin to that imposed upon a State that intentionally creates legislative districts of unequal size. Pet. App. 39-40. The two situations, however, are very different. Unlike in cases involving the drawing of legislative districts within a State on the basis of a given set of data, the myriad policy and statistical judgments required in assembling, evaluating, and deciding whether (or how) to adjust those data in the first place are not "capable of being reviewed under a relatively rigid mathematical standard." *Montana*, 503 U.S.

at 464. Moreover, in light of the varying measures of accuracy and equity and the competing claims of the States in the apportionment of Representatives—as well as the Constitution's plenary grants of authority to Congress in the Apportionment Clause and the Necessary and Proper Clause, Art. I, § 8, Cl. 18—the Secretary's "apparently good-faith choice of a method" for determining the respective populations of the States, pursuant to broad discretionary authority conferred on him by Congress, "commands far more deference than a state districting decision." *Montana*, 503 U.S. at 464.

b. The district court stated (without explaining precisely what it meant) that it was "satisfied that for most purposes the [post-enumeration survey (PES)] resulted in a more accurate—or to be statistically fashionable, a less inaccurate—count than the original census." Pet. App. 59. The court also stated (without substantial explanation) that "were this Court called upon to decide this issue *de novo*, I would probably have ordered the adjustment." *Id.* at 89. The district court did not, however, set aside the Secretary's determination that the distributive accuracy of the census would not have been improved by an adjustment. There is consequently no basis for the court of appeals' statement (*id.* at 38) that "the findings of the district court * * * plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable."

c. The court of appeals also referred repeatedly to the disproportionate undercount of racial minorities (see, *e.g.*, Pet. App. 33, 38, 39, 40), invoking that differential as a basis for its conclusion that the Secretary's decision not to adjust should be reviewed "under the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity." *Id.* at 39-40. The court of appeals was simply

wrong, however, in asserting that "[e]qual protection analysis requires that heightened scrutiny be given to the Secretary's decision to adhere to an acknowledged undercount that concededly impacts minority groups more severely than nonminority groups." Pet. App. 34. To the contrary, establishment of an equal protection violation based upon racial discrimination requires proof of a discriminatory *purpose*. *Washington* v. *Davis*, 426 U.S. 229, 239-245 (1976). The intentional undercounting of racial minorities in the conduct of the census (and in the resulting apportionment of Representatives) would be a matter of grave concern to the integrity of our democratic process. The courts would be open to consider such claims under the analytical framework followed in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and its progeny, and to afford relief where appropriate, see *Franklin*, 112 S. Ct. at 2776-2777 (opinion of O'Connor, J.).

In this case, however, neither the court of appeals nor the district court found that either the Secretary or other federal officials acted for the purpose of reducing the electoral power of (or otherwise disadvantaging) minority residents. Nor do the evidentiary considerations identified in *Arlington Heights* suggest a basis for such a claim. The Secretary's decision against adjustment was fully in keeping with historical practice, a fact that suggests a lack of discriminatory intent. Compare *Arlington Heights*, 429 U.S. at 267 & n.16 (abrupt departures from prior policy in ways that disadvantage minorities may constitute evidence of discriminatory motivation); *id.* at 270 (defendant "has applied [its] policy too consistently for [the Court] to infer discriminatory purpose from its application in this case").[21] Secretary Mosbacher's extensive explana-

[21] The Court in *Arlington Heights* also observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at

tion published in the *Federal Register* sets out a host of race-neutral reasons for his decision not to adjust. Compare *id.* at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). And the government's extraordinary efforts to enumerate minority residents [22] and to identify persons who initially failed to return questionnaires also belie any inference that Census officials pursued a deliberate policy of undercounting minority residents.[23]

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267. In the present case, the Secretary departed from customary procedures only by devoting enhanced consideration to the possibility of a statistical adjustment and explaining his ultimate decision in greater detail.

[22] In her recommendation to Secretary Mosbacher, Census Director Bryant stated (DX 1, at 1121-1122):

> For the 1990 census, the Census Bureau mounted the most extensive effort ever to enumerate Blacks and other minorities. This included the hiring of 280 community outreach workers who worked in communities two years before census taking; involvement of 56,000 community organizations—mostly minority but also city and state Complete Count Committees; outstanding cooperation from Black and Spanish language media in running public service announcements and programs about the importance of the census; and the hiring of follow-up enumerators from minority populations, bilingual and multilanguage enumerators, and residents of public housing projects and American Indian reservations to enumerate persons in their neighborhoods. Despite this effort, the undercount differential was not reduced below its historical level.

[23] "The Census Bureau followed up every housing unit for which a questionnaire was not returned," Pet. App. 327; its nonresponse follow-up policy required Bureau enumerators "to make up to six attempts to contact a household member and complete a census questionnaire," *id.* at 328. The Bureau also developed special procedures directed at individuals—such as residents of group quarters, transients, military personnel, homeless persons, and parolees and probationers—who the Bureau believed were particularly likely to be missed. See *id.* at 326, 330-331. The Bureau's "Were You

A disparate impact upon racial minorities, though not itself sufficient to establish a constitutional violation, may sometimes furnish evidence of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 265-266; *Davis*, 426 U.S. at 242. In the present case, it is undisputed that racial minorities were disproportionately undercounted in the 1990 census. But neither the Secretary nor the district court found (and plaintiffs did not show) that a failure to adjust the census totals would in turn have a disparate racial impact with respect to the proper allocation of Representatives among the States, the only constitutionally prescribed use of census data. There likewise was no such finding with respect to either the proper distribution of federal funds or the accurate drawing of congressional or legislative districts (a matter that is in any event the responsibility of the States, not the federal government). Indeed, as we have noted above (see pages 7-9, *supra*), Secretary Mosbacher concluded that he could not confidently determine that an adjustment would improve the distributive accuracy of the census even as a general matter. In light of the substantial evidence of legitimate nonracial reasons for the Secretary's decision against adjustment, a disparate racial impact at the numeric level is clearly insufficient to establish a constitutional violation.

3. The court of appeals' decision warrants review by this Court.

a. As the dissenting judge in the court of appeals observed (Pet. App. 40), the Sixth and Seventh Circuits have rejected constitutional challenges to the Secretary's determination that the 1990 census figures should not be

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Counted?" campaign provided individuals who believed that they had been missed with an additional opportunity for inclusion in the census. *Id.* at 330. Finally, units of local government were permitted to challenge the housing unit or group quarters count for any block; each of the country's 51 largest cities challenged at least some blocks, and eight cities challenged over 2000 blocks. *Id.* at 332.

statistically adjusted. Thus, the court in *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), concluded that "merely by directing congressional apportionment in accordance with the decennial census, Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." The Sixth Circuit relied on *Tucker* in concluding that "[t]he plaintiffs' claim to a census adjustment invokes no judicially administrable standards" because adjudication of the claim would require the court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1378 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994) (quoting *Tucker*, 958 F.2d at 1418). Moreover, this case is one of substantial national importance because of the possibility that the litigation could culminate in an order to reapportion the House of Representatives (and the Electoral College),[24] or in a judicially imposed requirement that the 1990 census data be adjusted in a manner that would result in a redistribution of federal funds among the States.[25]

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[24] We do not suggest that an actual reapportionment of Representatives (and presidential Electors) would be an appropriate remedy at this late date (halfway through the decade governed by the 1990 decennial census) even if the district court were to conclude on remand that, under the court of appeals' analysis, Secretary Mosbacher committed an error of constitutional dimension in 1991 in deciding not to make a statistical adjustment to the 1990 census.

[25] Guideline Three required that the adjusted figures be derived through "pre-specified" procedures. See Pet. App. 213-214, 215-217. As the Secretary explained in announcing the guidelines, "[t]his guideline specifie[d] that a set of procedures for generating proposed adjusted counts [would] be determined in advance of receiving the 1990 post-enumeration-survey estimates." 55 Fed. Reg. 9841 (1990). Thus, while the Secretary recognized the existence

b. The court of appeals in this case did not squarely hold that the Secretary's decision against adjustment violated the Constitution. Rather, it remanded the case to the district court for a determination whether the Secretary's decision "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 40. Although the interlocutory posture of the case might in other circumstances weigh against review by this Court, we believe that under the unusual circumstances now presented, review is warranted at this stage of the proceedings.

i. If the Court denies certiorari now and further proceedings must commence in the district court under the

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of a variety of defensible adjustment methodologies, see page 10, *supra*, the Secretary was ultimately presented with a choice between the unadjusted census and a single set of adjusted figures. If Secretary Mosbacher had authorized the particular adjustment proposed for his consideration in July 1991, and those adjusted figures had been made the basis for a reapportionment of Representatives among the States, the result would have been a loss of one Representative each for Wisconsin and Pennsylvania and a gain of one Representative each for California and Arizona. See Pet. App. 17, 250-251.

The large majority of the plaintiffs in this case, however, are States other than Arizona or California, or municipalities or residents of States other than Arizona or California. Although many of those plaintiffs may have suffered injury-in-fact due to the impact of the Secretary's decision upon the distribution of federal funds, cf. *City of Detroit*, 4 F.3d at 1374-1375, there is a substantial question whether plaintiffs outside Arizona and California may contest the allocation of Representatives among the States or invoke a heightened standard of review based upon the purported effect of the Secretary's decision upon the right to vote. See *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990) ("Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotation marks omitted); cf. *Franklin*, 112 S. Ct. at 2776 (plurality opinion) (Massachusetts lacked standing to challenge accuracy of census data absent allegation that it would have been allocated an additional Representative if different data had been used).

Second Circuit's erroneous analysis (subject to further review in the court of appeals and this Court), this case may well remain unresolved at or near the time of the 1996 presidential and congressional elections. That uncertainty could be avoided if this Court grants review at this time. Compare *Montana*, 503 U.S. at 445 (Court ordered expedited briefing and argument "[i]n view of the importance of the issue and its significance in [1992] congressional and Presidential elections").

ii. No further proceedings in the lower courts are needed to clarify the issues presented or to render the case suitable for resolution by this Court. As explained above, the Secretary's decision against adjustment was based upon his determinations that (1) distributive rather than numeric accuracy was of paramount importance, (2) the unadjusted figures would be treated as the most accurate unless adjusted numbers were shown to be better, and (3) the proposed adjustment had not been shown to improve distributive accuracy. No extensive factual record is needed for this Court to decide whether the first two determinations were "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 112 S. Ct. at 2777, and the district court has already concluded, based on a careful analysis of the administrative record and on testimony and exhibits introduced during a lengthy trial, that the third determination was not arbitrary or capricious. Respondents did not challenge the latter conclusion on appeal, and nothing in the Second Circuit's decision calls it into question. Given the terms of the court of appeals' remand, further proceedings in the district court are unlikely to assist this Court in its review of the relevant issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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